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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LEANDRO ROGER HERNANDEZ, Defendant and Appellant.	H022226 (Santa Clara County Super. Ct. No. C9947705)

A jury convicted defendant Leandro Roger Hernandez of transportation of methamphetamine, possession for sale of methamphetamine, and being under the influence of methamphetamine. On appeal, defendant contends that the trial court erred by (1) admitting gang-affiliation evidence over objection, and (2) instructing the jury in the language of CALJIC No. 17.41.1 (reporting juror misconduct). We disagree. We initially reject the People's threshold argument that defendant has waived his right to appeal. We then affirm the judgment.

BACKGROUND

Defendant drove his girlfriend in her car to a Home Depot store where the girlfriend attempted to buy merchandise with a stolen, altered check. He then drove her away. While driving, he began arguing with another motorist. The two drivers stopped the cars, got out of the cars, and continued arguing. The motorist punctured a tire on the girlfriend's car and left. While defendant was changing the tire, police brought witnesses from the Home Depot who identified the girlfriend as the person who tried to pass the check. The police

arrested the girlfriend and searched the car. They found two purses. One was the girlfriend's purse, which contained methamphetamine residue; the other was another woman's purse, which contained $235. They also found a dayplanner containing defendant's wallet, correspondence involving defendant, and an envelope on which what appeared to be phone numbers with code numbers next to them. One of the code numbers was "14 dash 14." Inside the wallet was $1,300, defendant's J.C. Penny credit card, and an address book with methamphetamine residue on it. The police also found a black pouch containing a red cloth and a 27.91-ounce rock of methamphetamine. They arrested defendant and tested defendant's blood, which tested positively for methamphetamine.

WAIVER

The People ask us to dismiss this appeal because, they urge, defendant waived the right to appeal. Though we agree that defendant waived his right to appeal, the waiver was conditional and the parties agreed to a remedy other than dismissal in the event defendant elected to appeal. This unusual situation arises from the following scenario.

Trial in this case was on May 16-23, 2000. On May 31, the following colloquy occurred in another case that was being prosecuted against defendant.

"[Defense counsel]: Mr. Hernandez has just gone through a jury trial in front of Judge Lee. And this case is a three strikes case, and it's set for sentencing on July 14th. The district attorney and Mr. Hernandez have entered into an agreement that if Mr. Hernandez waived his appellate right in the case in front of Judge Lee, which case number is –

"[The prosecutor]: C9947705.

"[Defense counsel]: — that at the time of sentencing, the district attorney will dismiss this case.

"[The prosecutor]: And just for clarification, Your Honor, although we will be asking for Mr. Hernandez to waive his appellate rights in that other case, we will also indicate that even if the case should be appealed, we would reserve the right to reinstate this

case and that we will be asking the statute of limitations be tolled during that time period. I don't anticipate a problem, but that's –

"[Defense counsel]: That's understood, Your Honor."

The judge then transferred case No. C9947705 to Judge Lee. At sentencing in this case on September 15, 2000, defendant confirmed to Judge Lee that he was waiving the right to appeal this case. No specific terms of the waiver agreement were reiterated or recited. After Judge Lee accepted defendant's waiver, the prosecutor moved to dismiss case No. C9947705 and Judge Lee granted the motion.

" ' "The valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived. . . ." It " '[i]s the intelligent relinquishment of a known right after knowledge of the facts.' . . ." The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver. . . . The right of appeal should not be considered waived or abandoned except where the record clearly establishes it.' " (*People v. Rosso* (1994) 30 Cal.App.4th 1001, 1006-1007, citations omitted.) "[C]ourts should look first to the specific language of the agreement to ascertain the expressed intent of the parties. [Citations.] Beyond that, the courts should seek to carry out the parties' reasonable expectations." (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120, fn. omitted.)

Here, the record in case No. C9947705 establishes that defendant waived his right to appeal the judgment in this case in exchange for a dismissal of case No. C9947705. But it shows further that the parties provided that, if defendant did appeal from the judgment in this case, the prosecutor reserved the right to "reinstate" case No. C9947705 without the burden of the statute of limitations running during such appeal.

The prosecutor's right to reinstate case No. C9947705 contraindicates a coextensive, implicit right to seek dismissal of an appeal in this case. This follows because there would be no need to enforce defendant's waiver agreement by reinstating case No. C9947705 if an appeal of this case could simply be dismissed. At the very least, the record

does not clearly establish that defendant unconditionally waived the right to appeal this case. Since defendant indeed appealed, the remedy is the right to seek reinstatement of case No. C9947705 rather than dismissal of this appeal.

GANG-AFFILIATION EVIDENCE

Campbell Police Officer Dan Livingston testified as the prosecutor's narcotics and gang membership expert. Over defendant's relevancy objection, Officer Livingston related that he could not discern a purpose for the red cloth in the black pouch except that the color red signifies a color adopted by the Norteno gang and gangs will often put something of their color with drugs to establish ownership. He added that the Norteno gang has adopted the number 14 as its number from the letter "N" being the 14th letter of the alphabet.

The prosecutor then proffered to show the jury a tattoo on defendant's left wrist that depicted the words, "San Jo," followed by the letter "X" and the number "4." According to Officer Livingston, the letter and number meant 14 and, as a tattoo, signified membership in or association with the Norteno gang.

Defendant objected on the basis of relevance and Evidence Code section 352. He urged: "[U]nder 352 I think this Court can weigh the probative value over the prejudicial effect, and I think in this case it's a highly prejudicial effect. There is very little evidence connecting Mr. Hernandez to the dope that was found on the seat, and at the very last minute the prosecutor is now trying to impugn gang activity on my client. Everybody knows that gang activity is something that is abhorred in society, particularly in San Jose where there have been gang problems. I think just raising the specter of gang activity when there's no – there's been no evidence of that I think is highly prejudicial, and I think the probative value is clearly outweighed by the prejudicial effect."

The prosecutor replied that the gang evidence was highly probative precisely because there was little evidence to link defendant to the drugs. She added that it was further

probative given that she expected (1) defendant's girlfriend to testify that the drugs were hers and defendant did not know about them,[1] and (2) defendant's booking photograph showed defendant wearing the color red. She added that she did not intend to develop that defendant was, in fact, a Norteno gang member.

The trial court ruled as follows: "But the question – the first question is whether it's relevant. It is clearly relevant if this information, to a reasonable trier of fact, could serve to connect the defendant to indicia, which is, in turn, connected in some way to the controlled substances. So I think it's relevant. The trier of fact may decide it's not a valid inference or it may decide it's a very important inference, but I think that's entirely up to the trier of fact. The more interesting question I think is whether it is more prejudicial than probative. [¶] In this case [defense counsel] is right that oftentimes just mentioning the words 'gang' or 'gang activity' can have a negative connotation, if you will, but another way to analyze this would be on analogizing it to if literature concerning a rock band were found in a vehicle and the defendant was found to have a tattoo relating to that rock band, I think you can reasonably, perhaps, form an inference between the two without having to suppose that the defendant is a member of that rock band. And even if they did, there are no allegations of gang violence in the sole relevance to this as it relates to possessory issues in this case and for no other reason. [¶] Therefore, exercising my discretion and weighing and balancing the probative effect versus the prejudicial value of the facts of this case, I find that it can be presented in such a way so that the probative value outweighs the prejudicial effect."

Officer Livingston then testified about the tattoo and its significance, and defendant displayed the tattoo to the jury.

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[1] Defendant's girlfriend did so testify.

In instructing the jury, the trial court gave a limiting instruction to the effect that the evidence of defendant's tattoo was not to be considered for the purpose of establishing whether defendant was a gang member or associate but for the purpose of connecting defendant to the charged crimes.

Defendant argues that "the trial court abused its discretion when it reached its conclusion that 'the probative value outweighs the prejudicial effect.' " He claims that the evidence was tangentially relevant. And he points out that gang evidence creates a risk that the jury will improperly infer criminal disposition and may have a highly inflammatory impact on the jury. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

We emphasize that it is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) And the trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear showing of abuse. (*Ibid*.) "While the concept 'abuse of discretion' is not easily susceptible to precise definition, the appropriate test has been enunciated in terms of whether or not the trial court exceeded ' "the bounds of reason, all of the circumstances before it being considered. . . ." ' [Citations.]" (*Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 152.) "A decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.] In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review." (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573-574.) This rule requires that the

reviewing court engage in all intendments and presumptions in support of the decision and consider the evidence in a light most favorable to the prevailing party. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1015.) It also requires that the party claiming abuse of discretion affirmatively establish the point. (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.)

Defendant simply fails to carry his burden on appeal. Rather than frame an abuse-of-discretion argument that focuses on the factors supporting the trial court's decision and explaining why it was irrational to rely on those factors, he reargues his points. In any event, it was not irrational for the trial court to conclude that the tattoo evidence was highly relevant: it suggested that defendant was associated with the Norteno gang, which, in turn, suggested that the methamphetamine rock (found with Norteno color identification) belonged to defendant. And it was not irrational for the trial court to conclude that the probative value of the tattoo evidence outweighed the prejudicial effect. While gang affiliation evidence "often carries with it a certain amount of prejudice, Evidence Code section 352 is designed for situations in which evidence of little evidentiary impact evokes an emotional bias." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) Here, the trial court could have rationally concluded that any emotional bias was negligible in light of the limiting instruction and given that the case did not involve gang issues, particularly gang violence.

CALJIC NO. 17.41.1

The trial court advised the jury as follows: "The integrity of the trial requires that jurors at all times during their jury deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court." (See CALJIC No. 17.41.1 (1998 new) (6th ed. 1996).)

Defendant claims that the instruction (1) violated his rights to jury trial and to the independent, impartial decision of each juror, and (2) infringed upon the jury's power to nullify. These and similar arguments were rejected in *People v. Engelman* (2002) ___ Cal.4th ___, ___ [2002 DJDAR 8034; 2002 WL 1578778].

In *Engelman*, the court determined that CALJIC No. 17.41.1 "does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict."[2] (*People v. Engelman, supra,* ___ Cal.4th ___, ___ [2002 DJDAR at p. 8034].)

The court was not convinced that, "merely because CALJIC No. 17.41.1 might induce a juror who believes there has been juror misconduct to reveal the content of deliberations unnecessarily (or threaten to do so), the giving of the instruction constitutes a violation of the constitutional right to trial by jury or otherwise constitutes error under state law." (*People v. Engelman*, *supra*, ___ Cal.4th at p. ___ [2002 DJDAR at p. 8035].)

The court explained: "[A]lthough the secrecy of deliberations is an important element of our jury system, defendant has not provided any authority, nor have we found any, suggesting that the federal constitutional right to trial by jury (or parallel provisions of the California Constitution, or other state law) requires absolute and impenetrable secrecy for jury deliberations in the face of an allegation of juror misconduct, or that the constitutional right constitutes an absolute bar to jury instructions that might induce jurors

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[2] However, the court recognized that "CALJIC No. 17.41.1 has the potential needlessly to induce jurors to expose the content of their deliberations" and "[t]he threat that the contents of the jury's deliberations might be reported to the judge could chill the free exchange of ideas that lies at the center of the deliberative process." (*People v. Engelman*, *supra*, ___ Cal.4th at pp. ___ [2002 DJDAR at pp. 8036-8037].) The court directed that "CALJIC No. 17.41.1 not be given in trials conducted in the future" because it believed that the instruction "creates a risk to the proper functioning of jury deliberations and that it is unnecessary and inadvisable to incur this risk." (*People v. Engelman, supra,* ___ Cal.4th at p. ___ [2002 DJDAR at p. 8037].)

to reveal some element of their deliberations." (*People v. Engelman, supra*, ___ Cal.4th at p. ___ [2002 DJDAR at p. 8035].)

The court found that "[t]he instructions as a whole fully informed the jury of its duty to reach a unanimous verdict based upon the independent and impartial decision of each juror. (CALJIC No. 17.40 ['The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must decide the case for yourself . . . .']; CALJIC No. 17.50 [instructing that in order to reach a verdict, 'all twelve jurors must agree to the decision'].)" (*People v. Engelman, supra*, ___ Cal.4th at p. ___ [2002 DJDAR at p. 8035].) It noted that CALJIC No. 17.41.1 "does not contain language suggesting that jurors who find themselves in the minority, as deliberations progress, should join the majority without reaching an independent judgment." (*People v. Engelman, supra*, ___ Cal.4th at p. ___ [2002 DJDAR at p. 8036].)

As to the argument that CALJIC No. 17.41.1 infringes upon defendant's constitutional right to jury nullification, it is without merit in light of *People v. Williams* (2001) 25 Cal.4th 441, 449-463. The court in *Williams* declared: "Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law." (*Id*. at p. 463.) The court explained that although the possibility of jury nullification exists because of certain procedural aspects of our criminal justice system, a defendant does not have a constitutional right to that possibility. (*Id*. at pp. 449-451.)

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Wunderlich, J.